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No. 93-406

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

REAL PARTIES IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court, when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on pending capital habeas corpus cases?

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STATEMENT OF THE CASE

After the filing of the State's petition for writ of certiorari, the following action has taken place in the District Court.

Correll v. Lewis.

Correll filed the additional memoranda ordered by the District Court. (See Petition for Certiorari at 6 n.3.) The State's final memorandum is due November 1, 1993. The State's Motion for Summary Judgment is still pending.

Villafuerte v. Lewis.

On September 28, 1993, the District Court granted the State's summary judgment motion and denied Villafuerte relief on any basis. On October 21, 1993, Villafuerte filed an appeal to the Ninth Circuit Court of Appeals.

Arnett v. Lewis.

As noted by Arnett in his Brief in Opposition, the District Court has set the evidentiary hearing for November 16, 1993.

REASONS WHY THE WRIT SHOULD ISSUE

THE QUESTION PRESENTED IS NOT MOOT BECAUSE THE DISTRICT COURT HAS NOT RULED ON THE STATE'S SUMMARY JUDGMENT MOTION IN CORRELL v. LEWIS, AND EVEN IF IT DOES, THE ISSUE IS "CAPABLE OF REPETITION, YET EVADING REVIEW."

In the Brief in Opposition, real party in interest Arnett, claims the issue is moot in his case because the District Court has set an evidentiary hearing. The same claim could now be raised in *Villafuerte* because the District Court has ruled on the State's motion for summary judgment. The District Court has not ruled on the State's Summary Judgment motion in *Correll*. For the reasons stated below, the State believes that, even if the District Court should rule on the Summary Judgment motion in *Correll*, the issue is not moot.

This Court has long recognized that this Court may still rule on an issue if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515 (1911); *Renne v. Geary,* ___ U.S. ___, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). While the "capable-of-repetition, yet-evading-review" exception is to be exercised in limited circumstances, this Court has indicated that it should be used where "[t]he need for . . . resolution . . . reflects a continuing controversy in the

federal-state area." *Moore v. Ogilvie*, 394 U.S. at 816. (*See* Amicus Brief of California, et al., at 12 n.11.)

As noted in the petition, Arizona is suffering from a severe diminution of its sovereignty because of the District Court's practice of taking years to rule on capital habeas corpus petitions. In an attempt to rectify the situation, Arizona selected a representative sample of the then pending cases, and filed a petition for writ of mandamus with the Ninth Circuit. The overall abuse of the system by the District Court is clearly more important than the individual facts of any one of the cases presented. As such, the cases were a vehicle the State attempted to use to force the Court of Appeals to exercise its supervisorial authority, and establish guidelines to enforce this Court's mandate in *Blodgett*.

The fact that the District Court has ruled on one case, set an evidentiary hearing on another, and ordered additional briefing on the third, does not resolve the issue of whether the District Court is failing to resolve capital cases in a timely fashion, and whether the Ninth Circuit, by not exercising its mandamus authority, abdicated its supervisory function. *Will v. United States*, 389 U.S. 90, 107 (1967). Arizona is suffering, and will continue to suffer, the harm recognized by this Court in *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 1469 (1991), because the excessive delay is prohibiting the State from enforcing a presumptively valid

conviction and sentence. The harm is not only occurring in Arizona, but across the nation. (Amicus Brief of California, et al., at 7–12.; Amicus Brief of Missouri at 3–10.) Clearly this is a harm "capable of repetition." *Southern Pacific Terminal v. Interstate Commerce Commission*, 219 U.S. at 515.

Likewise, the mandamus petition means little if the lower court can allow a case to languish for 10 years, and then avoid review by taking some action after the State files a petition for certiorari with this Court. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 546 (1976) ("The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired.") If such were the state of the law, the lower courts could forever thwart this Court from reviewing their delay.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition.

Respectfully submitted,
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